Lim Fang Keng v Toh Kim Choo

HIGH COURT (MELAKA) — ORGINATING SUMMONS NO 24–91–1994
SURIYADI J
7 SEPTEMBER 1995

Family Law *— Children — Custody — Protective jurisdiction — Not ousted by consent of parties — Status quo — Factor for consideration — Young children — Mother more suitable — Law Reform (Marriage and Divorce) Act 1976 s 88(1) & (2)*

The plaintiff and defendant were husband and wife respectively. They entered into a deed of settlement involving property transactions. With this deed as an indication of their mutual intention both parties agreed to divorce with the custody of their two children granted to the plaintiff. The defendant then withdrew her agreement to confer custody. The matter became contested and an interim order was issued for the children of the family temporarily conferred on the plaintiff pending the disposal of the custody suit. Before the case was heard, it became known that the defendant had embraced the religion of Islam while the plaintiff remained a Buddhist.

Held, granting custody to the defendant:

(1) The court ought not to be bound by the hurried consent of the defendant but instead examine the available evidence. The protection of the court over children in matters of custody or maintenance could not be ousted by the parents.

(2) In coming to a decision on custody, the issue of maintaining the status quo was only one of the factors to be considered.

(3) In the ordinary course of nature the mother was the right person to have charge of young children.

[Bahasa Malaysia summary

Plaintif dan defendan adalah masing-masing suami dan isteri. Mereka mengikat suatu suratikatan penyelesaian melibatkan transaksi harta. Dengan suratikatan ini sebagai penunjuk niat bersama, kedua-dua pihak bersetuju untuk bercerai dengan jagaan dua anak mereka diberikan kepada plaintif. Defendan kemudiannya menarik balik perjanjiannya untuk memberikan jagaan. Perkara itu menjadi pertikaian dan perintah interim dikeluarkan untuk kanak-kanak keluarga itu secara sementara diberikan kepada plaintif sementara menunggu penyelesaian guaman jagaan. Sebelum kes itu dibicarakan, adalah diketahui bahawa defendan telah memeluk agama Islam sementara plaintif kekal sebagai penganut agama Buddha.

Diputuskan, memberikan jagaan kepada defendan:

(1) Mahkamah tidak sepatutnya terikat dengan persetujuan tergesa-gesa defendan tetapi sebaliknya memeriksa keterangan yang ada. Perlindungan mahkamah terhadap kanak-kanak dalam perkara jagaan atau saraan tidak boleh disingkirkan oleh ibu bapa.

(2) Dalam mencapai keputusan mengenai jagaan, isu mengekalkan status quo hanyalah salah satu daripada faktor-faktor yang diambil kira.

(3) Dalam keadaan semulajadi yang biasa, ibu adalah orang yang sesuai untuk menjaga kanak-kanak yang masih kecil.]

Cases referred to

For cases on custody of children, see 7 *Mallal's Digest* (4th Ed) para 1495; [1989] *Mallal's Digest* 842; [1990] *Malla's Digest* 644–651; [1991] *Mallal's Digest* 1163–1165; [1992] *Mallal's Digest* 1009–1012; [1993] *Mallal's Digest* 816–818; [1994] *Mallal's Digest* 1389–1392; [1995] *Mallal's Digest* 1035–1040.

Cases referred to

K (Minors), Re [1977] 1 All ER 647 (folld)
K Shanta Kumari v Vijayan [1986] 2 MLJ 216 (folld)
KO, Re [1991] MLJ 494 (refd)
Mahabir Prasad v Mahabir Prasad [1982] 1 MLJ 189 (folld)
Teoh Eng Huat v Kadhi, Pasir Mas, Kelantan & Majlis Ugama Islam Dan Adat Istiadat Melayu Kelantan [1990] 2 MLJ 300
W v H [1987] 2 MLJ 235 (folld)
Wong Phila Mae v Shaw Harold [1991] 2 MLJ 147 (refd)

Legislation referred to

Federal Constitution art 12(4)
Guardianship of Infants Act 1961 s 5
Law Reform (Marriage and Divorce) Act 1976 s 88

KP Ng (*KP Ng & Amardas*) for the plaintiff.
Silas Seenivasagam (*Azariah & Associates*) for the defendant.

Suriyadi J: On 4 August 1994 the High Court Melaka after hearing Originating Summons No 24–91–1994 issued an interim custody order whereby the children of the plaintiff and the defendant were temporarily conferred on the plaintiff pending the disposal of the custody suit. On 10 August 1995 the court varied the interim order but only as regards the right of access. 24 August 1995 was the hearing date to finally determine the custody of the two children.

The relevant evidence adduced come in the form of encl 2 the supporting affidavit of the plaintiff, encl 4 the affidavit in reply of the defendant, encl 8 an additional affidavit of the plaintiff, encl 12 the affidavit of the plaintiff's sister supporting his application and encl 48 the report of

Encik Mohd Emeran bin Abdul Salam from Pejabat Kebajikan Masyarakat Daerah Melaka Tengah, Melaka. The case took an interesting twist when the plaintiff revealed that sometime in July 1994 the defendant embraced the religion of Islam whilst the plaintiff remained a Buddhist. Lest there be any untoward allegation on this sensitive factor the court after being alerted began to tread much more carefully and reverted to both parties enquiring whether they wanted additional time to submit on that point. Fortunately both parties agreed not to pursue this matter but to merely concentrate on the welfare of the children which is the paramount consideration. Despite these assurances the court cannot draw much comfort from them or become complacent because of the provisions of the Guardianship of Infants Act 1961 (Act 13 of 1961) and the Federal Constitution on the assumption the court grants custody to the mother. Article 12(4) of the Constitution provides that the religion of a person under the age of 18 years is to be decided by the parent or guardian. This is affirmed in the case of *Teoh Eng Huat v Kadhi, Pasir Mas, Kelantan and Majlis Ugama Islam dan Adat Istiadat Melayu Kelantan* [1990] 2 MLJ 300 where his Lordship Abdul Hamid LP at p 302 remarked:

> In all the circumstances, we are of the view that in the wider interests of the nation, no infant shall have the automatic right to receive instruction relating to any other religion than his own without the permission of the parent or guardian.
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> Reverting to the issue before this court, the crucial question remains whether the subject, an infant at the time of conversion, had legal capacity according to the law applicable to her. It is our considered view that the law applicable to her immediately prior to her conversion is the civil law. We do not agree with the learned judge's decision that the subject although below 18 had capacity to choose her own religion. As the law applicable to the infant at the time of conversion is the civil law, the right of religious practice of the infant shall therefore be exercised by the guardian on her behalf until she becomes a major. In short, we hold that a person under 18 does not have that right and in the case of non-Muslims the parent or guardian normally have the choice of the minor's religion.

Section 5 of the Guardianship of Infants Act 1961 which I reproduce now reads:

> Subject to the provisions of section 10 the father of an infant shall be the guardian of the infant's person and property:

These legal niceties and trappings cannot be ignored by the court were the parents to take differing views relating to the children's religious education in the near future. The uncertainties that could be created by the desires of the well-intended parents could well result in negative consequences to their well-being and mental growth. If the court decides in favour of the plaintiff then this factor can be eliminated as one of the considerations to be taken into account.

With all these available facts to be considered and after having reminded myself of the legal demands I now proceed to sift through the evidence and the law pertaining to the subject of custody. Section 88(1) of the Law Reform (Marriage and Divorce) Act 1976 provides:

A (1) The court may at any time by order place a child in the custody of his or her father or his or her mother ...

(2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard—

B (a) to the wishes of the parents of the child; and

(b) to the wishes of the child, where he or she is of an age to express an independent opinion.

In the case of *Wong Phila Mae v Shaw Harold* [1991] 2 MLJ 147 at p 150 Chao Hick Tin J when laying down certain pointers to be mulled C over by courts said:

> We agree with counsel for the appellant that some of the relevant factors are these:
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> (i) the conduct of the parties;
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> (ii) the wishes of the parents and the wishes of the child where he or she D is of an age to be able to express an independent opinion;
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> (iii) a young child would be best looked after by its mother;
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> (iv) which party can offer better security and stability; and
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> (v) that siblings should not be separated.

E Nearer home in the case of *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189 especially at p 193 para D (right) Raja Azlan Shah CJ (as he then was) when delivering the judgment of the Federal Court said:

> In arriving at his decision the learned judge has considered what will be in the best interests of the two children and what will be best to promote their welfare and protect their rights. In considering their welfare he has F considered, amongst other things, the conduct of the parents in so far as it might indicate their future behaviour, the question whether the children of tender age should be with their father or mother, the situation in Bombay and Malaysia, the wife's apparent ability to spend some long and continuous period with the two children in the immediate future, the present situation where the children are brought up by the father's own G family, the confidential reports of the social welfare officer and the firm wishes of the children who want to be with their mother.
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> Also the learned judge had considered the status quo of the children ...
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> In short the learned judge has given the overriding consideration of the welfare of the children uppermost in his mind. That, we think, is the H correct approach. We would state categorically that that must be first and paramount consideration and other considerations must be subordinate.

At the outset the plaintiff drew the attention of the court to encl 2 in particular para 3 of the deed of settlement which involves property transactions between the two claimants. The defendant is to transfer a particular property to the plaintiff and in consideration RM110,000 is I to be defrayed to the defendant. With the deed as an indication of their mutual intention both agree to divorce with the custody of the children granted to the plaintiff. A joint petition was signed by both parties and a reference number was obtained from the court but never adjudicated

upon as it was subsequently withdrawn. The plaintiff's counsel took exception to the withdrawal of the defendant's agreement to confer custody in favour of the plaintiff and drew strength from it. He submitted that by so consenting to the custody she thus had recognized his suitability and competency to protect and raise the children. To encroach into the realm of tear jerking drama and theatrics the court cannot ignore the reality of life that when parties are spellbound by idealism and matters of the heart nothing else matters, but when the beautiful dream shatters, a new set of thinking and consideration sets in. Beset by frustration and anger and a whirlpool of pent-up emotions waiting to explode it is not inconceivable that parties will concede to any condition however unsound so long as they can escape and go their separate ways as quickly as possible. Therefore even though the court is intimidated by the deed of settlement and the joint petition the court feels that it ought not to be bound by the hurried consent of the defendant but instead examine the available evidence. To cap this point I refer to the case of *W v H* [1987] 2 MLJ 235 under held (1) which reads:

> Held: (1) No infant's rights can be compromised in any document drawn by adults without the prior approval of the court. Parents cannot oust the protection of the court over their children in matters of custody and maintenance.

On the factor of conduct it must be recorded that none of the parents have betrayed any lack of interest or concern for the well-being of the children be it before or after the breakdown of the marriage. Their commendable commitment is highlighted by their attempts to be around the children, despite the heavy schedules which occasionally took them to late hours of the day. The necessity and demands of work which deny them quality time with the issues must not be taken against them as life must go on. To overcome these shortcomings both parties have resorted to families to assist them whenever the need arose. During the interim period the plaintiff admits that he has to seek the assistance of his sister to have the two children under her wings from about 1 pm to 6 pm (see encl 12).

Similarly before the interim order was issued the defendant had to depend largely on the children's maternal grandmother for supervision when she was busy at work. The predicament and the approach of the couple demands me to summarize the views of the siblings who are unappreciative of their aunt's contribution. Even though the factor of comfort and ambience seem to influence their views the court cannot ignore and downplay these factors as to do so will reflect insensitivity and short sightedness on the part of the court. The unhappiness as voiced out by the two children is not helped either by bullying tactics of the cousins and the slur of the plaintiff's sister as regards their mother. Surely with such a hostile surrounding nothing positive can emanate from it that can contribute positively to the welfare and mental growth of these unfortunate children.

The plaintiff submitted that the status quo should be maintained as the plaintiff to date had performed well in his duties and had taken care of the children. Not surprisingly the defendant replied that the

A plaintiff merely did the expected. Undaunted the plaintiff further submitted that to uproot the children when the transient arrangement was working well would not do much good to them. Despite the intense ventilation of this valid argument previous eminent judges have consistently opined that no court should shackle itself to such arguments. In coming to a decision the issue of maintaining the status quo is only B one of the factors to be considered. In fact if the court is to acquiesce to the submission of the plaintiff on this point the court will certainly be accused of being unsympathetic to the children's pleas.

On the point of law may I reproduce Bromley's *Family Law* (7th Ed) at p 327 which reads:

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> There can be little doubt that maintaining continuity of care is of overwhelming importance in deciding custody cases. Indeed the empirical evidence shows that the courts normally make orders confirming the existing situation and only rarely orders a transfer of custody. Nevertheless the status quo is only a factor and the court may well think that the child's welfare in any particular D case might be better served by being moved.

Returning to the case of *Mahabir Prasad v Mahabir Prasad* cited above Raja Azlan Shah CJ (as he then was) at p 194 said:

> We are also aware of the damage done to emotional development of children if they are suddenly removed from a known, secure, supporting E set of relationships, and thrust among strangers, even if they be some blood relationship with one or more of the strangers. In some cases this may be explored by calling expert evidence; in others, the ordinary experience of the courts is relie d upon. But this does not mean that the status quo must always be preserved. It merely means that we must anxiously consider the evidence placed before the court and determine F how best to promote the interests and welfare of the children. After having done that we are of the opinion that it cannot be but for the children's interest and welfare that they be returned to their mother.

The court will not deny reality that a mother not as a matter of law but in the ordinary course of nature is the right person to have charge of young children (Sir John Pennycuick in *Re K (Minors)* [1977] 1 All ER G 647 at p 655). In cases of custody without beating around the bush the real point is whether the children are to be deprived of the love, care and devotion of their natural mother considering their tender age (*Re KO* [1991] MLJ 494). Wan Yahya J (as he then was) in *K Shanta Kumari v Vijayan* [1986] 2 MLJ 216 came strongly for mothers when H his Lordship remarked:

> Even going on the assumption that both parents are equally capable of providing the care, comfort and attention to the infant, the courts have always leaned in favour of the mother being given custody of young infants. The reason is very obvious. An infant of tender age is by nature more physically and spiritually dependent on its own mother than anyone else. I

A very telling point which strongly supports the mother's case is the factor of choice when the two intelligent and perceptive children chose her over the father. In fact the choice of the siblings did surprise the court especially when prior to the hearing date they had been with their

father for a span of time during which period they could have been coached much to the detriment of the defendant. Evidence wise in this case it is not a question of the court uprooting the children and planting them with a stranger as the mother cannot be said to have appeared suddenly out of the blue. The evidence adduced clearly show that during the relevant time she had been hovering around the children and did make her presence felt.

Perhaps it is quite timely for me to touch on encl 48 now which is the report of the officer from the Jabatan Kebajikan Masyarakat Melaka Tengah. In this very well-researched document Encik Mohd Emeran had the opportunity of interviewing all the relevant parties and simultaneously assessing the social and economic background of the plaintiff and the defendant. He concluded that as regards the crucial emplacement of the two children who are of the tender age of nine and eleven years the mother will be the more suitable person to have custody.

To summarize in deciding in whose custody the children shall be placed the court is fully aware that the paramount consideration is their welfare and after having regard to:

(a) the conduct and attitude of the parties;
(b) the age of the children;
(c) the views of the children;
(d) the ambience in the plaintiff's sister's house;
(e) the advantages of a natural mother over the father;
(f) the physical and spiritual needs of infants for their natural mother;
(g) the security and stability of the contending parties;
(h) the advantages and disadvantages of maintaining status quo;
(i) the desirability of not separating the siblings;
(j) the confidential report of the Social Welfare Officer; and
(k) the current religious status of both parties of which I give the minimum of consideration and the effect of the controversy were they to differ in their views pertaining to the children's future religious upbringing,

I grant custody of the children to the defendant and reasonable access to the plaintiff. Cost to the defendant.

Order accordingly.

Reported by PY Lo